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In the Supreme Court of the United States

OCTOBER TERM, 1969

UNITED STATES OF AMERICA, APPELLANT

v.

PHILLIPSBURG NATIONAL BANK AND TRUST COMPANY, SECOND NATIONAL BANK OF PHILLIPSBURG, AND WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the district court (App. 667) is reported at 306 F. Supp. 645.

JURISDICTION

The judgment of the district court (App. 701) was entered on October 20, 1969, and a notice of appeal to this Court was filed on November 28, 1969. Probable jurisdiction was noted on February 27, 1970

(App. 702). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act, 15 U.S.C. 29. *United States* v. *Third National Bank in Nashville*, 390 U.S. 171; *United States* v. *Philadelphia National Bank*, 374 U.S. 321.

STATUTES INVOLVED

The pertinent portions of the Clayton Act and the Bank Merger Act of 1966 are printed in the Appendix, *infra*, pp. 59-64.

QUESTIONS PRESENTED

1. Whether the district court erroneously rejected commercial banking as a relevant product or service market in which to test the competitive effect of bank mergers in small communities.[1]

2. Whether, in an antitrust action challenging a proposed merger of banks located in a community in which the banking business is predominantly local, the court may properly refuse to consider the merger's probable effect on competition in that community because, on the basis of evidence of general social and economic integration, it deems the relevant geographic market to be a broad multi-community area.

3. Whether, in such an action, the court's consideration of the "convenience and needs of the community to be served" is legally insufficient if the "community" whose "needs" are considered is narrower

[1] This question was preserved in the jurisdictional statement (J.S., p. 3, n. 1, p. 19, n. 17).

than the relevant geographic market in which the anticompetitive effects of the merger are measured.

4. Whether, in any event, the court below erred in its determination of the convenience and needs issue by failing adequately to consider whether the same benefits could be achieved by less anticompetitive means.

STATEMENT

1. The Proceedings

In April 1967, Phillipsburg National Bank and Trust Co. ("PNB") and Second National Bank of Phillipsburg ("SNB"), both with their headquarters in Phillipsburg, New Jersey (App. 668), agreed to merge. Phillipsburg is directly across the Delaware River from Easton, Pennsylvania, its twin city (App. 894). The two cities are in the northeastern part of the Census Bureau's Allentown-Bethlehem-Easton, Pennsylvania—Warren County, New Jersey standard metropolitan statistical area (hereafter "Lehigh Valley").

On May 1, 1967, the banks applied to the Comptroller of the Currency for approval of the transaction as required by the Bank Merger Act of 1966 (12 U.S.C. (Supp. IV) 1828(c), App. *infra*, pp. 59-60). Pursuant to Section 1828(c)(4), the Federal Reserve Board, the Federal Deposit Insurance Corporation and the Attorney General each submitted independent reports to the Comptroller on the competitive factors involved.[2] The Federal Reserve Board concluded

[2] Copies of the Application for Approval to Merge, the reports to the Comptroller and the Comptroller's decision have been lodged with the Clerk of this Court. All of these are public documents.

that the overall competitive effect of the merger would be substantially adverse because it would eliminate a significant degree of competition in the Phillipsburg-Easton banking market and would reduce banking alternatives in Phillipsburg from three to two by merging that city's two largest banks (FRB Rep., p. 4). The Federal Deposit Insurance Corporation reported that the merger would harm competition in Phillipsburg-Easton, particularly in the Phillipsburg sector of the area; it noted that the resulting bank would be approximately three times the size of the remaining Phillipsburg bank and that the public's banking choices there would be reduced (FDIC Rep., p. 2). The Attorney General also concluded that the merger would have a significantly adverse effect upon competition in the Phillipsburg-Easton area.

The Comptroller approved the merger on December 18, 1967. He concluded that the other banking agencies and the Attorney General had defined both the product market and the geographic market too narrowly (Comp. Rep., pp. 3, 7-8). Treating most of the Lehigh Valley as the relevant geographic market and evaluating competition from 34 finance companies, 13 savings and loan institutions and insurance companies as well as 38 commercial banks in this broad area, he determined that there would be no significant anti-competitive effect (*ibid.*). He also concluded that the merger would provide the resultant bank with an opportunity for expansion and enable it to hire specialized management personnel (*id.* at 9).

On January 16, 1968, the United States filed the present suit in the district court charging that the

proposed merger might substantially lessen competition in violation of Section 7 of the Clayton Act (App. 3-7). This automatically stayed the merger's consummation. 12 U.S.C. 1828(c)(7)(A). The Comptroller intervened as a defendant (App. 14). After an eleven-day trial in September 1968 (App. 1-2), the district court held that the proposed merger was lawful (App. 700), and dismissed the complaint.[3] The court continued the statutory stay pending disposition of this appeal (App. 701).

2. Bank-Customer Relations in Phillipsburg-Easton

Phillipsburg, New Jersey, is an established industrial city of 18,500 inhabitants situated on the Delaware River in the southwestern corner of Warren County, New Jersey. Including the city's immediate environs,[4] the population of the Phillipsburg sector (hereafter "Phillipsburg") was approximately 28,500 in 1960 (App. 678-679). While the city's population has been static for a long period, the surrounding suburbs have been growing steadily in population, commerce and industry (App. 679-680; 261-263).

Easton, Pennsylvania, directly across the Delaware River from Phillipsburg, is a larger industrial city of 32,000 people. Including the city's surrounding com-

[3] At a hearing prior to the entry of judgment for the defendants, the record was reopened and evidence was admitted relating to changes in State banking law that took effect since the trial (App. 580-595).

[4] Lopatcong, Pohatcong, and Greenwich townships, and Alpha Borough.

munities,[5] the Easton sector (hereafter "Easton") had a total population of 60,000 in 1960. As in Phillipsburg, the city's population has remained stable while its environs have grown in population, industry and commerce (App. 679-680; 287-288).

Phillipsburg and Easton are linked by bridges, one a free bridge directly connecting the downtown areas of the two cities, and the other a toll bridge located just north of the main business districts on an interstate highway for which ticket books reducing the toll to less than three cents a crossing may be purchased (App. 45, 115, 229, 435-436). The two cities were described by a Phillipsburg businessman as "in effect * * * one town" (App. 287).

The Lehigh Valley, in which Phillipsburg and Easton are located, is an area of approximately 1,000 square miles, which also includes the cities of Bethlehem, Pennsylvania (population 55,325), thirteen miles west of Phillipsburg; Allentown, Pennsylvania (population 108,347), eighteen miles west; and Nazareth, Pennsylvania (population 6,209), twelve miles northwest (App. 678-679, 803-804, 894).

There is considerable mobility among the residents of the area. Residents of Phillipsburg shop in Easton and vice versa, and drive to the larger towns as well (App. 45, 58, 70, 224-225, 286-288, 291-292, 366-367, 386-387, 499-500, 634-635). The labor force is also mobile; many residents of Phillipsburg and Easton

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[5] The townships of Forks, Williams and Palmer, and the boroughs of Wilson, West Easton, Glendon, Stockertown and Tatamy, all in Northampton County, Pennsylvania (App. 677).

drive to work elsewhere, sometimes across the river (App. 193-194, 423, 432-433, 814-815). Nevertheless, as a Bethlehem banker testified, "the three cities, Bethlehem, Easton and Allentown have developed pretty independent cultures, and people do cross lines and so forth and it is integrated socially and economically, but not nearly to the extent that you might guess" (App. 104).

Although the Lehigh Valley contains 38 banks,[6] customer preferences for local service and prevailing conservative banking practice tend to limit the bulk of each institution's business to its primary service area (App. 29, 57-58, 62, 78-80, 81, 89, 131-132, 258, 399, 468, 554-555, 564-565, 652). Individual depositors in this area choose their banks primarily on the basis of convenience to their residence (*e.g.*, (App. 85, 201, 257, 263, 273, 665); small businessmen also tend to prefer banks in their local community (App. 277-278, 290, 326-327, 355, 375, 421-422, 430-431, 434). Large commercial and industrial borrowers, investors of sums in excess of $5,000 and settlors of trusts, however, are more likely to shop on a regional or even national basis; and as the amounts involved increase, the significance of local preference declines (App. 90, 100, 165, 235-236, 333-334, 339-340, 353-354, 355-356, 369-370, 487, 489-491, 510-512, 528, 600, 653).[7]

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[6] 1969 Statistical Abstract of the United States, p. 892.

[7] For larger investors, significantly higher interest rates may make a difference. The Girard Trust Bank's branch in Riegelsville, Pennsylvania, 10 miles from Phillipsburg, offered a 5 percent investment bond sold mainly in $5,000 multiples,

Small banks, such as PNB and SNB, are patronized principally by small depositors and borrowers[8] to whom the convenience of one-stop banking (App. 181, 653) and the advantages of good relationships with a local banker are important (App. 58, 106, 114, 271). A customer who uses one service usually looks to his bank for others as well, and is encouraged to do so (App. 63-64, 77, 119, 146, 181, 183; see App. 615). Checking and savings accounts are likely to be maintained in the same local bank even when higher savings interest is available elsewhere (App. 38, 520, 624, 635, 653), and an established depositor expects, and sometimes receives, favorable consideration as a small borrower (App. 22, 119, 280).

The merging banks reflect this pattern of predominantly small customers with a local orientation characteristic of banks in relatively small communities (App. 83-84, 133-134) and particularly in the Lehigh Valley trading area (App. 37-40, 83-84, 90, 100, 133-134, 137-140, 759-760, 788). For example, 74 percent of PNB's number of total deposits, and 72 percent of SNB's, are less than $1,000; and 96 percent and 97 percent, respectively, are less than $10,000. Similarly, 76 percent of PNB's number of loan accounts,

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and mailed promotional literature to Phillipsburg-Easton attorneys, physicians and morticians in December 1967. It is estimated that this has attracted some 3 percent of total Phillipsburg-Easton deposits. See App. 235-236, 603-604.

[8] More than 80 percent of the number of all deposit accounts in banks with total deposits of between $10 million and $25 million are less than $1,000. Federal Deposit Insurance Corporation, *Summary of Accounts and Deposits in All Commercial Banks*, 4 (1968).

and 58 percent of SNB's, are less than $2,500, and 94 percent and 96 percent, respectively, are less than $10,000 (App. 725-726, 733-734). Banks elsewhere in the Lehigh Valley, including banks within 10 or 14 miles of Phillipsburg-Easton, derive relatively little business—"a few scattered accounts" (App. 55; see App. 74)—from that community (App. 53-57, 64-68, 96-98); and the Phillipsburg-Easton banks similarly do relatively little business outside that area (App. 31-32, 37-40, 120-125). The vast bulk of the merging banks' deposits and loans originate in Phillipsburg-Easton: 91.6 percent of PNB's total deposits and 78.6 percent of its total loans; 92 percent of SNB's total deposits and 87.2 percent of its total loans (App. 725-738, 817-818; see n. 29 *infra*, p. 37).

Even within Phillipsburg-Easton, banking is localized in each of the two communities (App. 198-204). For example, the Easton branch of Nazareth National Bank in Forks gets no business from Phillipsburg (App. 78, 86). Although Phillipsburg businessmen regard Easton as an alternative credit source, they strongly prefer to borrow from banks in Phillipsburg (*e.g.*, App. 421, 434, 490-491, 636).[9] Of the merging banks, Phillipsburg National derived only 10.9 percent of its total time and savings deposits from Easton, and Second National only 9.6 percent (App. 731-732).

There are several indications that the banks in Phillipsburg-Easton enjoy substantial insulation from outside competition. Nearly every one of the approxi-

[9] State boundaries also contribute to localization of banking business (App. 62, 78, 93, 130, 201, 207, 606-607).

mately 8,500 families in Phillipsburg deals with one of that community's three commercial banks (App. 176). Banks outside Phillipsburg-Easton rarely solicit or advertise there except to the extent that audiences elsewhere are served by media also serving Phillipsburg-Easton (App. 54, 77, 87-88, 99, 252, 266, 559, 604-605). Phillipsburg-Easton banks similarly rarely solicit outside their area (App. 43, 79, 132-133, 228, 627, 633).[10] Finally, the Phillipsburg-Easton banks have increased their savings deposit accounts substantially even though their passbook savings rates were lower than the rates paid by other banks in the area (App. 753). As of December 31, 1967, Easton banks were paying only 3 percent and Phillipsburg banks 3½ percent interest, while banks in towns within a thirteen-mile radius were paying 4 percent (App. 63, 94, 116-117, 118-119, 198-201, 652-653).

3. The Merging Banks and the Banking Structure In Their Community

Phillipsburg has three commercial banks, and Easton has four.[11] Phillipsburg National, the acquiring bank, is the largest bank in Phillipsburg and the third largest bank in Phillipsburg-Easton. As of 1967, its assets were $23.9 million, its deposits were $22.4 million, and its loans and discounts were

[10] They advertise principally in the Easton or Phillipsburg local newspapers and generally do not solicit elsewhere for business (App. 723-724; GX-53 at p. 209; DX-60 at p. 163).

[11] Six of these seven institutions have their headquarters in Phillipsburg-Easton; the seventh is a branch of the Nazareth National Bank of Nazareth, Pa., which has a branch in Forks Township, a suburb of Easton (App. 740-751).

$14.5 million. It held 13.7 percent of Phillipsburg-Easton deposits and 15.8 percent of the community's loans and discounts. Between 1957 and 1967, it doubled its assets, doubled its deposits, and tripled its loans and discounts (App. 752-753).[12] In addition to its main office in downtown Phillipsburg it operates two branches, both of which were opened in the suburbs of Phillipsburg in 1964 (App. 262, 642-643. See App. 627-628).

Second National, the acquired bank, is the second largest bank in Phillipsburg and the fifth largest bank in Phillipsburg-Easton. It is in direct competition with PNB (Merger App., n. 2, *supra*, p. 3). Its main office is directly across the street from PNB's, and its only branch is across the highway from Phillipsburg's Hillcrest office (App. 10, 15, 202). It had assets of $17.3 million, deposits of $16 million, and loans and discounts of $10.5 million in 1967. It accounted for 9.8 percent of Phillipsburg-Easton's total deposits and 11.4 percent of its loans and discounts (see p. 13, *infra*). It has also grown rapidly in the last decade, increasing its assets 82 percent and its deposits 86 percent, and tripling its loans and discounts (App. 752; see App. 775-776).

Both of the merging banks offer the wide range of services customarily available from commercial banks, including demand deposits, savings and time deposits, consumer loans, installment loans, commercial and industrial loans, real estate mortgages and trust serv-

[12] Its rate of growth in the preceding five years exceeded that of the other two Phillipsburg banks (App. 754-756, 775-776).

ices, safe deposit boxes, escrow services and utility bill collections (App. 174, 246, 705). The ratio of their loans to deposits is higher than that of any other bank in Phillipsburg-Easton (App. 764). As is true of other Phillipsburg-Easton banks, a substantial volume of their loans is in real estate mortgages (*e.g.*, App. 39-40, 656-657, 764; see *supra*, pp. 7-8); business loans, both real estate and commercial or industrial, represent 22.2 percent and 21.2 percent respectively of each bank's loans (GX-86 p. 2; see App. 763-764; cf. App. 100).

As previously noted (*supra*, pp. 8-9), the services of these two banks are oriented primarily toward small customers. Phillipsburg National, for example, conducted the local grammar school savings program (App. 246), and, when other banks were refusing, offered both FHA and VA home financing and college tuition loans (App. 21, 73, 246-247, 269, 637). It also made numerous unsecured loans on the basis of character, which are very difficult for area borrowers to get elsewhere (App. 271-272, 280. Compare App. 58, 106, 114, 437-438). PNB increased its installment lending portfolio from $700,000 to $3 million within a five-year period, but then stabilized it in 1966 when its directors ordered loan officers to concentrate again on real estate mortgages (App. 413-414).

The structure of the commercial banking market in Phillipsburg-Easton, as of December 31, 1967, is summarized in the following chart:

[Dollar amo
(App. 739, 740-

BANK	No. of Offices	ASSETS Amount	Percent Phill.-East.	Percent Phill. Only	TOTAL DEPOSITS Amount	Percent Phill.-East.
Phillipsburg Nat.	3	$23.9	11.2	44	$22.4	11.8
Second Nat.	2	17.3	8.1	31.8	16	8.4
[Resulting Bank	5	41.1	19.3	75.8	38.4	20.2
Phillipsburg Trust Co.	2	13.2	6.2	24.2	12.1	6.4
Easton Nat. Bank & Trust	5	75.6	35.5	——	67.7	35.6
Northampton Nat. Bank Easton	1	23.2	10.9	——	19	10
Lafayette Trust Bank	2	27.7	13.0	——	24.3	12.8
Nazareth Nat. Bank *	1	32.0	15.0	——	28.7	15.1
Forks Township Branch	—	——	——	——	——	——
Totals	16	$212.8	100	100	$190.1	100

* While the deposit figures for Naz
branch, the assets and loan figure
total assets and loan figures of
the portion attributable to the b
somewhat understates the perce
including the appellees.

[Dollar amounts in millions]
(App. 739, 740-741, 742-743, 747)

ASSETS		TOTAL DEPOSITS			DEMAND DEPOSITS			LOANS		
Percent hill.-East.	Percent Phill. Only	Amount	Percent Phill.-East.	Percent Phill. Only	Amount	Percent Phill.-East.	Percent Phill. Only	Amount	Percent Phill.-East.	Percent Phill. Only
11.2	44	$22.4	11.8	44.3	$6.5	10.1	45	$14.5	15.8	48.9
8.1	31.8	16	8.4	31.7	4.6	7	31.3	10.5	11.4	35.2
19.3	75.8	38.4	20.2	76.1	11.1	17.1	76.4	24.9	27.3	84.1]
6.2	24.2	12.1	6.4	23.9	3.4	5.3	26.3	4.7	5.2	15.9
35.5	——	67.7	35.6	——	25.4	39.2	——	32.6	35.7	——
10.9	——	19	10	——	6.4	9.8	——	6.5	7.1	——
13.0	——	24.3	12.8	——	10.8	16.7	——	11.8	12.9	——
15.0	——	28.7	15.1	——	7.8	12.0	——	10.8	11.9	——
100	100	$190.1	100	100	$65	100	100	$91.5	100	100

* While the deposit figures for Nazareth National Bank are segregated by branch, the assets and loan figures are not. This chart, therefore, uses the total assets and loan figures of Nazareth National Bank (rather than the portion attributable to the bank's Easton branch) and accordingly somewhat understates the percentages attributable to the other banks, including the appellees.

These figures show that, of Phillipsburg-Easton's 7 banks, the two largest—Easton National Bank and Trust Co. and Lafayette Trust Co., both in Easton—account for 56 percent of the area's total deposits, 63 percent of total demand deposits and 44 percent (7 out of 16) of the banking offices. When Phillipsburg National's share is added, the three largest banks account for 69 percent of total deposits and 74.2 percent of demand deposits. In the Phillipsburg sector, which is served only by the two merging banks and their small competitor, the Phillipsburg Trust Co., PNB has 43.9 percent of total deposits and SNB has 32.2 percent; of loans and discounts PNB has 49.8 percent and its merger partner 34.9 percent. Of the 7 Phillipsburg banking offices, the merging banks control 5.

The combined bank would be the second largest in Phillipsburg-Easton with assets of $38.8 million (19.3 percent), total deposits of $36 million (20.2 percent), and loans and discounts of $22.8 million (27.3 percent). The total share of deposits held by the two largest banks would increase by 9 percent to 65 percent, and the share held by the three largest banks would increase 10 percent. The two largest banks would control 10 of the 16 banking offices, *i.e.*, 62.5 percent of the total. The impact in the Phillipsburg sector would, of course, be much greater (see App. 205, 207-208, 210). The banking alternatives in Phillipsburg would be reduced from 3 to 2, the combined bank would be three times larger than Phillipsburg Trust Co., and all but 2 of the banking offices in Phillipsburg would be controlled by one firm.

The record provides no indication that this substantial increase in banking concentration is likely to be alleviated by new entry into the market. Entry is restricted by both New Jersey and Pennsylvania banking statutes, and although recent changes in New Jersey law have made it possible for banks in the northern part of that State to enter the Phillipsburg area by merger, this would not increase the number of banking alternatives available in the community.[13] Expert testimony indicated, moreover, that

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[13] When the complaint was filed, New Jersey law prohibited the merger of banks located in different counties, and restricted branch banking to the county in which the parent bank was located (N.J. Stat. Ann. § 17:9A-19(B) (1963)). Additionally, a "home-office-protection" proviso precluded branching into cities in which another bank had its home office or into communities in which a bank or branch was already located (N.J. Stat. Ann. § 17:9A-19(B)(3) (1963)). Entry into "home-office-protected" communities could be effected only through merger with a bank in the community by a bank outside the community but in the same county.

Under a New Jersey banking statute, enacted on January 17, 1969, and effective July 17, 1969, that State is divided into three banking districts (N.J. Stat. Ann. § 17: 9A-19(F) (Supp. 1969)), of which Phillipsburg is in the first. Districtwide *de novo* branching and merger are authorized, subject to the retained "home-office-protection" proviso. In addition, the law precludes branching into communities of less than 7,500 in which a bank branch is already located. N.J. Stat. Ann. § 17: 9A-19(B)(3) (Supp. 1969).

No community on the New Jersey side of the Phillipsburg-Easton community is open to *de novo* branching from outside Warren County under the new statute because of the "home-office-protection" provision; entry by merger, however, is now possible for some 80 New Jersey banks located in the First Banking District (App. 588-589, 777-780). The question whether a national bank may avoid the operation of the State "home-office-protection" proviso by moving its "main office" into a protected community, while simultaneously "reopening" the former "main office" as a branch office, is

the chartering of new banks in Phillipsburg-Easton does not appear to be a significant probability (App. 211, 213-215).

There is no evidence that as a group the seven banks in Phillipsburg-Easton are failing to meet the community's banking needs. Four of the banks have loan limits which approach or exceed one-quarter million dollars and one has a limit of more than one-half million.[14] Requests for loans in the $100,000 to $500,000 category are infrequent (App. 137).[15] Large borrowers can, and do, satisfy their

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before the Court of Appeals for the Third Circuit in *Ramapo Bank* v. *Prospect Park National Bank & William B. Camp.* In *Marion National Bank* v. *Van Buren Bank*, 418 F. 2d 121 (C.A. 7, 1969), it was held that a similar action was precluded under analogous Michigan banking law.

Pennsylvania Banking Law is similarly restrictive, permitting new branching only in contiguous counties. Purdon's Pa. Stat. Ann. 7-904 (1965). See *United States* v. *Philadelphia National Bank*, 374 U.S. 321. Easton, located in Northampton County, is protected by Bucks County against branching by Philadelphia banks (App. 402-403).

[14] The legal lending limits of the commercial banks in Phillipsburg-Easton as of December 31, 1966, computed on the basis of ten percent of the sum of capital, surplus, and undivided profits, were as follows (App. 765):

PHILLIPSBURG NATIONAL	$100,701
SECOND NATIONAL	107,414
Phillipsburg Trust	53,167
Easton National Bank	587,049
Northampton National Bank	369,259
Lafayete Trust Bank	224,362
Nazareth National Bank	294,354

[15] PNB estimates that it receives 25 requests per year for loans which exceed its lending limits ($100,000) and SNB estimates that it receives 12 such requests per year. Only 25 of PNB's total of 5,566 loans, and only 17 of SNB's total of 2,235 loans, were for more than $50,000. (App. 271, 733-734.)

credit needs from outside the Phillipsburg-Easton area (App. 90, 290, 333, 339, 355, 412, 418, 426, 429, 440, 444-445).

Lending limits, which depend to some extent on the accounting method used to calculate them, are computed as 10 percent of capital and surplus of undivided profits and reserves, as approved by banking authorities (see 12 U.S.C. 24. But see App. 82, 89, 111, 136, 403-404). Using the most conservative method of calculation, PNB's lending limit was $90,000 and SNB's was $80,000 (App. 670. But see n. 14, *supra*, and App. 248, 713). The district court found that, when combined, the two banks would have a limit of $250,000 (App. 670), presumably by reason of changes in accounting methods relating to their capital structure.

4. The District Court's Decision

In dismissing the complaint, the district court held that the merger would not be anticompetitive in the broad geographic market it deemed relevant, and that "any conceivable anticompetitive effect" was in any event clearly outweighed by the merger's effects in meeting the convenience and needs of the community (App. 699).

Treating the product market first, the court recognized that "commercial banking" has been identified in all previous bank merger decisions of this Court as an appropriate line of commerce, but decided over the government's objection (App. 549-550) that a "detailed analysis of all the competitive banking services offered to the public by the merging banks is necessary in each case" (App. 669). The court excluded

from its consideration services not offered to any great degree by the defendants as well as services "in which competition from many sources [such as savings and loan associations, pension funds, mutual funds, government bonds, insurance companies and finance companies] is so widespread that no question of significant diminution of competition by the merger could be raised" (App. 675).

The lines of commerce selected by the court included checking accounts, savings accounts, certificates of deposit, personal loans, consumer installment loans and commercial loans of less than 100,000 dollars. Trust services, small real estate mortgage loans, automobile dealer financing, "large scale commercial inventory financing" and commercial and industrial loans in excess of 100,000 dollars were excluded. (App. 670.) While conceding that "[t]he approach adopted may not be orthodox," the court deemed it appropriate because, in light of the small size of the defendant banks and their high proportion of savings deposits to demand deposits, "this is not the usual bank merger case" (App. 675). The court did not, however, make specific findings as to the effect of the merger in each of the lines of commerce it had selected. Instead, presumably because some of the services it selected are unique to commercial banks, the court analyzed the merger's effects on competition only in terms of the product market it had earlier rejected—commercial banking (App. 681-689).

Turning to the question of the appropriate geographic market, the court rejected both of the government's proposed alternatives, Phillipsburg-Easton

and environs or Phillipsburg and environs (App. 677).[16] It chose instead an area slightly smaller than the entire Lehigh Valley (but excluding Allentown). The area selected encompasses thirteen towns and cities, including Bethlehem in Northampton County and five cities and towns in Bucks County, Pennsylvania, plus the southwest half of Warren County and the northwest portion of Hunterdon County, New Jersey (App. 678-679). The court treated as not significant the government's statistical showing of the localized nature of the existing banking business (App. 681), and the court's opinion made no mention of the growth of savings deposits in Phillipsburg and Easton banks while they were paying a lower rate of interest than other banks in the Lehigh Valley (see *supra*, p. 10). The court relied instead on evidence of population mobility tending toward general economic integration of the broader area (App. 679-680), and, apparently, on the court's expectation that the increased size of the merged banks would permit them to offer services in a somewhat wider area than at present (App. 688).

The court held that the government had failed to establish that the merger "would have any measurable anticompetitive effect" in this broad area (*ibid.*).

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[16] The advisory banking agencies treated Phillipsburg and environs as a relevant banking sector or submarket, and the government introduced evidence below showing banking localization and concentration in Phillipsburg. After the court made clear its rejection of Phillipsburg as a relevant market (see App. 25-26, 567-568), the government relied in its trial brief upon Phillipsburg-Easton. See Plaintiff's Trial Brief, pp. 10-18.

Moreover, the court stated that under applicable New Jersey law there were "many locations [in the New Jersey part of the court's geographic market] where either a new bank or a branch bank could be established" (App. 687).

The court then found that the potential ability of the merged bank to supply one sector of its geographic market—Phillipsburg—with commercial loans of more than 100,000 dollars and trust services (services excluded from the court's lines of commerce) clearly outweighed any conceivable anticompetitive effect (App. 689-690). As to less anticompetitive alternatives to merger which might achieve these benefits, the court found that "tentative" exploration of obtaining qualified officers to specialize in commercial lending and trust services was properly abandoned because of the cost of employing such personnel (App. 690) and that meeting local loan needs through participation with other banks had "disadvantages" (App. 697).

INTRODUCTION AND SUMMARY OF ARGUMENT

The fundamental question in this case is whether the antitrust standards defined by this Court in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, and preserved in the Bank Merger Act of 1966,[17] apply to mergers of directly competing small commercial banks[18] in the nation's smaller commu-

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[17] See *United States* v. *Third National Bank in Nashville*, 390 U.S. 171, 181-182 (hereafter *"Nashville Bank"*); *United States* v. *First City National Bank*, 386 U.S. 361, 363-364 (hereafter *"Houston Bank"*).

[18] In 1968 there were 13,630 commercial banks in the United States, of which 11,798—86.6 percent—had deposits of less

nities. The difference between the competitive impact of horizontal mergers among the great city banks and the nation's small town banks is merely one of scale. Indeed, because there tend to be fewer financial institutions to provide alternatives in small communities for those in need of their services, the considerations set forth in the *Philadelphia Bank* opinion apply *a fortiori*—including the basis for defining the product and geographic markets and for evaluating the competitive consequences of reducing alternatives in already concentrated banking markets.

Commercial banks, with their unique clustering of financial products and services in one institution, are peculiarly significant to the economy of communities whose population is too small to support a large array of differentiated savings and credit businesses. In such communities, dependence on local bankers for financial services tends to be even greater than in the city. Convenience of access to a bank is as important. Small town residents and businessmen have the same interest in preserving the range of banking choices in their community as do urban borrowers and savers. For in the small town as well as the large, "if the businessman is denied credit because his banking alternatives have been eliminated by mergers, the whole edifice of an entrepreneurial system is threatened; if the costs of banking services and credit are allowed to become excessive by the absence of competitive pressures, virtually all costs,

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than $25 million. Federal Deposit Insurance Corporation, *Summary of All Accounts and Deposits in All Commercial Banks*, 4, 7 (1968).

in our credit economy, will be affected * * *" (*Philadelphia Bank*, 374 U.S. at 372).

We shall show, first, that the district court erred in rejecting the government's contention that here, as in the *Philadelphia Bank* case, commercial banking is a relevant product market in which to test the competitive effect of the merger. The merging banks have all the basic attributes of commercial banks outlined by this Court in *Philadelphia Bank*; hence their unique cluster of financial products and services "composes a distinct line of commerce" (374 U.S. at 356).

We shall then show that the court similarly erred in rejecting the government's contention that Phillipsburg-Easton is a relevant geographic market within which to assess the effects of this merger on competition. That this is an area in which the merger's effects will be direct and immediate is shown by the application here of a number of factors emphasized in this Court's *Philadelphia Bank* opinion—including the importance, especially to small customers who are principally served here, of convenient access in banking; the fact that banks in Phillipsburg-Easton generally compete for deposits within a radius of only a few miles (and have paid lower rates of interest to depositors than were being offered by nearby banks outside of Phillipsburg-Easton); and the fact that the vast bulk of the business of banks in Phillipsburg-Easton, including that of the merging banks, is localized within the area.

Finally, we shall show that there were several legal errors in the district court's evaluation of the

merger's effects on competition and determination of whether those anticompetitive effects are clearly outweighed by offsetting benefits to the convenience and needs of the community to be served. First, had the court considered the merger's effects in the relevant geographic and product markets identified by the government, it should have concluded that this merger, which will substantially increase concentration in an already highly concentrated market, may substantially lessen competition. Because of this error, the court balanced the convenience-and-needs factor against an erroneous assessment of competitive impact. Second, the court balanced competitive impact in a broad multi-community area against the convenience and needs of Phillipsburg considered in isolation, whereas the Act requires that both factors be assessed with reference to the same "community" or geographic market. Third, the court misapplied the convenience-and-needs standard by focusing only on the asserted needs of customers for large business loans and trust services and exaggerating the benefits that the merger would afford those customers. Fourth, the court and the merging banks failed adequately to consider alternative ways of achieving the merger's purported benefits—including reasonably available internal steps that either bank might have taken and the possibility of less anticompetitive mergers. For all of these reasons, the court failed to balance the factors with the kind of accurate, detailed consideration that the Act requires; and the case should, therefore, be remanded for further consideration under correct criteria.

ARGUMENT

I

Commercial Banking Is a Relevant Product Market

The term "commercial banking" covers the cluster of products and services offered by the only institutions permitted by law to accept demand deposits,[19] to create additional money and credit, to participate in and manage the nation's checking account system and to furnish short term business loans.[20] While commercial banks compete with certain other financial in-

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[19] Mutual savings banks in New Jersey are permitted to accept demand deposits, but there are no such institutions in Phillipsburg-Easton or in the Lehigh Valley (App. 175, 453).

[20] In *United States* v. *Philadelphia National Bank, supra,* 374 U.S. at 326-327 n. 5, this Court noted:

> The principal banking "products" are of course various types of credit, for example: unsecured personal and business loans, mortgage loans, loans secured by securities or accounts receivable, automobile installment and consumer goods installment loans, tuition financing, bank credit cards, revolving credit funds. Banking services include: acceptance of demand deposits from individuals, corporations, governmental agencies, and other banks; acceptance of time and savings deposits; estate and trust planning and trusteeship services; lock boxes and safety-deposit boxes; account reconciliation services; foreign department services (acceptance and letters of credit); correspondent services; investment advice. It should be noted that many other institutions are in the business of supplying credit, and so more or less in competition with commercial banks (see further, pp. 356-357, *infra*), for example: mutual savings banks, savings and loan associations, credit unions, personal-finance companies, sales-finance companies, private businessmen (through the furnishing of trade credit), factors, direct-lending government agencies, the Post Office, Small Busines Investment Corporations, life insurance companies.

stitutions in seeking deposits or in supplying credit, their demand deposit functions make them unique in the cluster of financial services they offer (App. 174-186).[21]

The merging banks here have all of the basic attributes of commercial banks outlined in *Philadelphia Bank, supra.* In a single institution they offer demand deposits; create credit; pay interest for the use of other people's money in time and savings deposits and lend it at greater interest; and offer short-term business loans and longer term real estate loans and even a modest trust service (see Statement, *supra*, pp. 11-12; see, also, App. 19, 52, 76, 182, 246).[22] This case is therefore governed by the holding in *Philadelphia Bank* (374 U.S. at 356-357) that:

> the cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term "commercial banking," see note 5, *supra*, composes a distinct line of commerce. Some commercial bank-

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[21] Accordingly, competition with other financial institutions does not eliminate the need for competition between commercial banks themselves. See *Hearings on S. 1698 Before the Subcommittee on Domestic Finance of the House Committee on Banking and Currency*, 89th Cong., 1st Sess., at 378-379 (testimony of Federal Reserve Governor Mitchell).

[22] As is characteristic of banks of their size operating in small communities (*e.g.*, App. 95-96), their ratio of commercial loans to deposits is low, and a higher proportion of their loans is in residential and business real estate mortgages than is in short term commercial credit. This is typical of banks in the Lehigh Valley. See App. 83-84, 100, 133-134. See, generally, 55 Fed. Res. Bull. Charts A-20 and A-24.

> ing products or services are so distinctive that they are entirely free of effective competition from products or services of other financial institutions; the checking account is in this category. Others enjoy such cost advantages as to be insulated within a broad range from substitutes furnished by other institutions. For example, commercial banks compete with small-loan companies in the personal-loan market; but the small-loan companies' rates are invariably much higher than the banks', in part, it seems, because the companies' working capital consists in substantial part of bank loans. Finally, there are banking facilities which, although in terms of cost and price they are freely competitive with the facilities provided by other financial institutions, nevertheless enjoy a settled consumer preference, insulating them, to a marked degree, from competition; this seems to be the case with savings deposits. In sum, it is clear that commercial banking is a market "sufficiently inclusive to be meaningful in terms of trade realities." *Crown Zellerbach Corp.* v. *Federal Trade Comm'n*, 296 F. 2d 800, 811 (C.A. 9th Cir. 1961). [Footnotes omitted.]

The court below refused to follow this standard. In a ruling it characterized as "not orthodox" (App. 675), it purported to analyze the product market by "different groupings within the line of commerce separating those products and services where absence of competition may be significant from those in which competition from many sources is so widespread that no question of significant diminution of competition by the merger could be raised" (App. 675). As previously noted, however, the court did not make any findings as to the competitive significance of this

merger on the fragmented lines of commerce it selected.

The court's stated reason for refusing to follow *Philadelphia* was that the merging banks here have a considerably smaller proportion of demand deposits to total deposits, and of commercial and industrial loans to total loans, and a larger proportion of time and savings deposits to total deposits, than did the large city banks in *Philadelphia*. From this it concluded that competition from other types of institutions was necessarily greater than in large cities and that the defendant banks were engaged in only limited activity in fields unique to commercial banking (App. 672).

This approach disregards the fundamental teaching of *Philadelphia:* that it is the cluster of products and services which commercial banks offer, and not merely the ones that are unique to them, which as a matter of trade reality make commercial banking a distinct line of commerce. Commercial banks are to financial services what super-markets are to food retailing: a place where varied products and services—some unique and some not—are gathered together at a point of convenient access. In addition, the banks' credit-creating and demand-deposit functions, in whatever proportion, give them a distinctive role and influence on the economy of their community. Customers in small communities desire and utilize this cluster of services no less than city dwellers (see Statement, *supra*, p. 8).

If the district court's analysis were correct, all of the banks in Phillipsburg-Easton and most of those

elsewhere in the Lehigh Valley and in other small communities across the nation, which have similar ratios of business to those of the appellee banks (App. 764; see *supra*, pp. 7-8, 11-13), would be removed from the category of commercial banking for purposes of antitrust analysis and preserving competition. The result would be that residents of small communities would be denied the protection of the law enjoyed by city dwellers, and would have no assurance that competitive alternatives in commercial banking would be preserved for them.

The Bank Merger Act of 1966 did not change the definition of lines of commerce, or draw a distinction in this respect between city banks and banks in small communities. Its legislative history largely records a struggle over the criteria and procedures which should apply to institutions within the reach of the *Philadelphia* decision—*i.e.*, all commercial banks. The final enactment continued the antitrust standard for bank cases that had previously obtained (*Nashville Bank*, 390 U.S. at 182; *Houston Bank*, 386 U.S. at 363-364), and manifested "no intention to alter the traditional methods of defining relevant markets * * *" (*Nashville Bank*, 390 U.S. at 182, n. 15).

The court below recognized, with reference to the appellee banks, that " 'commercial banking' may be used to designate the general line of commerce embracing all bank services * * *" (App. 669). The evidence showed that the merging institutions were commercial banks (see *supra*, pp. 11-12), and the district court made no finding to the contrary. Since it also

made no findings with respect to the fragmented lines of commerce which it designated as appropriate product markets, and since it ultimately considered only commercial banks in measuring the merger's impact (App. 681-689), the court seemed tacitly to recognize the impracticality of analyzing bank mergers in the manner it proposed.[23] Although submarkets such as the court defined are sometimes appropriate for purposes of Section 7 analysis,[24] they may not be utilized to exclude from consideration a more general distinctive product or service market that is significant in terms of commercial realities. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 326; *United States* v. *Continental Can Co.*, 378 U.S. 441, 457. Accordingly, commercial banking was a relevant line of commerce here.

II

Phillipsburg-Easton Is a Relevant Geographic Market

In the district court, the government contended that the anticompetitive effects of this merger should be

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[23] Several other district courts, as well as the Comptroller of the Currency, have also purported to analyze bank mergers with reference to numerous lines of commerce as proposed by the district court here. See, *e.g.*, *United States* v. *Crocker-Anglo National Bank*, 277 F. Supp. 133, 153-162 (N.D. Cal.); *United States* v. *Provident National Bank*, 280 F. Supp. 1, 7-9 (E.D. Pa.); *United States* v. *First National Bank of Jackson*, 301 F. Supp. 1161, 1179-1183 (S.D. Miss.); *United States* v. *First National Bank of Maryland*, 1970 CCH Trade Cases ¶ 73,061, at pp. 88,157-88,161 (D. Md. 1970).

[24] For example, some of the district court's individual lines of commerce would obviously be relevant in analyzing the effect on competition of a merger between a commercial bank and another type of financial institution.

judged either in Phillipsburg or in Phillipsburg-Easton, and that in either market the effect of the merger may be substantially to lessen competition. The district court held, however, that neither geographic area is an appropriate "section of the country" under Section 7; it ruled that "*the* appropriate geographic market" was a substantially broader area covering a major part of the Lehigh Valley (App. 678, emphasis added).

"[W]ithin [a] broad [product] market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes" (*Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325). The principle is equally applicable to geographic markets; there may be several areas in which it is appropriate to test the effect of a merger upon competition, and if the proscribed effect occurs in any one of them, the merger is illegal. See *United States* v. *Pabst Brewing Co.*, 384 U.S. 546, 552. For Section 7 bars mergers that may substantially lessen competition in "any" section of the country, and "The language of this section requires merely that the Government prove the merger may have a substantial anticompetitive effect somewhere in the United States" (*Pabst*, *supra*, at p. 549). Moreover, the size of the particular area where the merger has an impact is immaterial in determining whether that area is an appropriate market; Section 7 is designed to preserve and protect the benefits of competition in small communities as well as in vast metropolitan and larger regions. Cf. *Brown Shoe Co.* v. *United States*, 370 U.S. 294,

339; *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 519.

In defining a relevant market under Section 7, "The proper question to be asked * * * is not where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate.[25] * * * This depends upon 'the geographic structure of supplier-customer relations.' * * * In banking, as in most service industries, convenience of location is essential to effective competition." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 357-358.

In selecting the geographic market in this case, the district court failed to follow the foregoing settled principles, and as a result made three basic errors: (1) it improperly assumed that only a single market exists; (2) it ignored the evidence in the record that this merger would have a "direct and immediate" effect upon banking competition in Phillipsburg and Phillipsburg-Easton; and (3) rather than focusing on the area where the merger would have such an impact, it instead stressed the economic and social inte-

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[25] The anticompetitive effect with which Section 7 is concerned is the change in the structure of a market that a merger causes, rather than the particular anticompetitive practices, such as price changes, that follow such change. For Section 7 is designed to forestall such practices by preventing the changes in market structure that lead to them. See, *e.g.*, *Brown Shoe Co.* v. *United States*, 370 U.S. at 346; *Philadelphia Bank*, 374 U.S. at 365; *United States* v. *Von's Grocery Co.*, 384 U.S. 270, 277. Accordingly, the area of impact that defines an appropriate geographical market is an area where such structural changes occur.

gration among the population and other businesses in the larger merchandising area that it viewed as the only appropriate geographic market. Under the teachings of this Court, the record shows that Phillipsburg-Easton is a relevant market for testing the effect of this merger upon banking competition.

In *Philadelphia Bank*, this Court pointed out (374 U.S. at 358-360):

> Individuals and corporations typically confer the bulk of their patronage on banks in their local community; they find it impractical to conduct their banking business at a distance. See *Transamerica Corp.* v. *Board of Govs. of Fed. Res. Sys.*, 206 F. 2d 163, 169 (C.A. 3rd Cir. 1953). The factor of inconvenience localizes banking competition as effectively as high transportation costs in other industries. * * * Theoretically, we should be concerned with the possibility that bank offices on the perimeter of the area may be in effective competition with bank offices within; actually, this seems to be a factor of little significance.

In *Philadelphia*, this Court held that a four-county area was a relevant market for evaluating the competitive effect of the merger of the second and third largest of 42 banks in the Philadelphia metropolitan area. It emphasized a number of factors:

(1) the particular importance in banking of convenient access (374 U.S. at 358, 360-361, 369);

(2) the fact that banking offices generally compete for deposits within a radius of only a few miles (374 U.S. at 358 n. 35);

(3) the principle that a borrower's or investor's market varies directly with his size: "[T]he smaller the customer, the smaller is his banking market geographically" (374 U.S. at 359 n. 36);

(4) the fact that the vast bulk of the banks' business originated within the area (374 U.S. 359 n. 36), and that their business from outside the area was relatively slight (374 U.S. at 360 n. 37);

(5) the view of other federal banking agencies that the region was an area of effective competition (374 U.S. at 361); and

(6) the concentration of all the banks' offices within the area, as required by State law (374 U.S. at 361).

The Court also noted, in defining the product market, the importance of habit, custom, personal relationships and convenience as a factor tending to insulate banks from other competition—even when higher rates are offered for savings deposits (*e.g.*, App. 652-653). 374 U.S. at 357, n. 34.

With one exception,[26] these factors are equally applicable to the Phillipsburg-Easton area—although

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[26] When this suit was filed, New Jersey law did not limit the merging banks to operating in Phillipsburg, but permitted them to open branches anywhere within their home county (Warren County). While the case was pending, New Jersey law was amended to permit branching on a broader basis. See note 13, *supra*, p. 16. Since no one contended that either Warren County or the broader area in which the merging banks may now do business was an appropriate geographic market, this factor is not involved in this case.

naturally on a reduced scale—and they establish that that area constitutes an appropriate section of the country for testing the effect of this merger upon competition.

(1) Convenience of access is as important in this small community as it is in the larger markets (cf. App. 665).[27] Thus, although these cities are sufficiently small so that there is easy access to the center of either town where the banks have their main offices, the banks found it necessary to establish branches in surrounding townships within a radius of a few miles. They opened branches there because that is "where the customers are (App. 273)."

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[27] This is a general principle of the banking business. Compare *Philadelphia Bank*, at 358 n. 35. As the Federal Reserve Board noted in another proceeding, quoted in *Transamerica Corp.* v. *Board of Governors*, 206 F. 2d 163, 167-168 (C.A. 3), certiorari denied, 346 U.S. 901:

> Because of the frequency of need for access to one or more of the services of commercial banks, such banks draw their business largely from areas within which customers may conveniently visit the banks as occasion may require. Thus, in this aspect of their customer relations, commercial banks are largely local, and for the usually needed customer services a distant bank cannot adequately serve a customer. Very large concerns with national credit standing have access to credit from banks in many parts of the country and may also maintain accounts in widely scattered banks. This does not apply, however, to the great multitude of the customers of commercial banks. The smaller concerns, local business enterprises, and ordinary citizens must depend upon their local commercial bank or banks for the financial services peculiar to such banks; for all these customers there is no alternative or substitute, because distantly located banks do not serve or supply their needs.

(2) As the foregoing facts demonstrate, banking offices in Phillipsburg-Easton generally compete for deposits within a radius of only a few miles. Moreover, the merging banks do no significant advertising outside the area and banks from outside the area advertise within it only as part of incidental coverage utilized to reach other markets (see Statement, *supra*, p. 10).

(3) The customers principally served are relatively small: 74 percent of PNB's and 72 percent of SNB's number of total deposits are less than $1,000; and 96 percent and 97 percent, respectively, are less than $10,000 (App. 725-726, 733-734). Of total loans, 76 percent of PNB's and 58 percent of SNB's are less than $2,500, and 86 and 94 percent, respectively, are less than $10,000.[28]

(4) The vast bulk of the merging banks' business, and that of the other Phillipsburg-Easton banks as well, is localized within the area. For example, nearly every family in Phillipsburg deals with one of that community's three banks (App. 176). The merging banks' deposit and loan statistics show that they draw about 85 percent of their total banking business in every category from the Phillipsburg-Easton area. About 90 percent of each bank's total deposits, demand deposits, and time and savings deposits originate there; as well as 78 percent of PNB's total loans

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[28] Only 25 of PNB's 5,566 loans, and only 17 of SNB's 2,235 loans, exceed $50,000 (App. 733-734).

and 87 percent of SNB's.[29] Indeed, the business is so localized that the merging banks draw only about 10 percent of their deposits from Easton (App. 731-732). And, as the district court itself found in assessing the convenience and needs of the community to be served, Phillipsburg's businessmen prefer to deal with one of the three banks in that sector (App. 691, 693-697).

The small amount of business that the merging banks do outside the area results from special personal contacts or business relationships (App. 37-38, 40, 41-42, 80, 97, 269, 637). Similarly, banks from outside the area do relatively little business within it (App. 53-57, 64-68, 74, 96-98).

(5) The two other banking agencies required by the Bank Merger Act to comment on the competitive factors involved in this case also viewed Phillipsburg-Easton, or the Phillipsburg sector thereof, as the pri-

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[29] DEPOSIT AND LOAN ACCOUNTS OF PHILLIPSBURG NATIONAL AND SECOND NATIONAL LOCATED WITHIN PHILLIPSBURG-EASTON DECEMBER 30, 1967

(Percent of Total)

		Phillipsburg National		Second National	
		number	value	number	value
App. 725-726:	Total Deposits	91.6%	87.4%	92 %	88.8%
App. 727-728:	Demand Deposits	88.1	83.7	90.7	84.8
App. 729-730:	IPC Demand Deposits	88.2	83.8	90.8	88.7
App. 731-732:	Time and Savings Deposits	92.7	89.1	92.6	90.4
App. 733-734:	Total Loans	78.6	77.7	87.2	81.6
App. 735-736:	Comm. & Indust. Loans	79.5	86.9	90.9	76.0
App. 737-738:	Real Estate Loans	86.8	82.1	87.8	82.5
App. 817-818:	Installment Loans	77.2	67.9	88.0	86.2
App. 819-820:	Single Payt. Loans	73.4	58.5	74.6	69.7

mary area in which the merger's competitive impact would be felt (FDIC Rep., p. 2; FRB Rep., p. 4).

The extent to which the Phillipsburg-Easton banks were insulated from competition outside the area is dramatically illustrated by their practice with respect to interest rates on savings deposits. As of December 31, 1967, commercial banks elsewhere in the Pennsylvania and New Jersey sectors of the trial court's geographic market—many of them located only a few miles from Phillipsburg-Easton—were paying 4 percent interest on ordinary passbook savings accounts (some had been paying this rate since 1962). Commercial banks in Phillipsburg as of that date, and until at least July 1968, paid only 3½ percent on these accounts; Easton commercial banks paid 3 percent.[30] Yet Phillipsburg National's rate of deposit growth during 1962-1967 exceeded that of most Lehigh Valley banks known to be paying the higher rates of interest on such accounts during some or all of that period, and similar growth was experienced by Second National (see Statement, *supra*, pp. 10-11).

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[30] The president of Easton National Bank testified "3 percent was paid from October 1, 1959 until July 1, 1968. * * * We were authorized to go to a 4 percent level several years ago, and the regulations permitted us to, but we chose not to increase our rate" (App. 117). Phillipsburg National, however, had paid 3½ percent since early 1962. Almost all banks on the periphery of the Phillipsburg-Easton area were paying 4 percent during that period. Phillipsburg National's president explained that the half-percent differential enabled them to keep most small accounts because for them it "doesn't mean this much" (App. 635). Phillipsburg and Easton banks, however, almost simultaneously followed Lafayette Trust's lead when that Easton bank increased its rate to 4 percent (App. 118).

Despite the demonstrated localization of banking in this area, it is of course possible for customers from Phillipsburg-Easton to go elsewhere if they can afford the time and tolerate the inconvenience, and if an institution primarily serving another community is interested in dealing with them. Cf. *United States* v. *Provident National Bank*, 280 F. Supp. 1, 14-15 (E.D. Pa.) The broader market used by the district court in effect implies that Phillipsburg-Easton residents can protect themselves against the adverse competitive consequences of this merger by thus banking elsewhere. But as the Court noted in *Philadelphia*, this is largely a question of their size. "Small businessmen especially are, as a practical matter, confined to their locality for the satisfaction of their credit needs * * *. If the number of banks in the locality is reduced, the vigor of competition for filling the marginal small business borrower's needs is likely to diminish" (*Philadelphia Bank* at 369). Moreover, small depositors have little reason to leave their money for safe keeping or checking purposes in communities they visit only on occasional shopping trips (Tr. 295). Whatever may be the social and economic integration of the larger region, it does not create the kind of credit relationship, based on intimate local knowledge, that opens the doors of banks to small businessmen, householders and those whose primary security is their character (App. 58, 280-281). Nor does it evidence the kind of convenience that encourages the residents of an area to use a bank's deposit and other services.

The possibility that the resulting bank might compete more vigorously in the future with banks serving peripheral areas, as a ground for using the broader area relied on by the district court (*compare* App. 29-30, 33-34, 125-126, *with* App. 688), does not controvert the government's proof that in Phillipsburg and Easton the immediate effect of the proposed merger would be elimination of competition between two substantial firms and a significant increase in an already high degree of concentration.[31] "[W]hile there is undoubtedly some commercial intercourse between smaller communities within a single 'standard metropolitan area,' the most intense and important competition * * * will be confined to * * * the particular communities in such an area and their immediate environs." *Brown Shoe* at 339. As *Philadelphia Bank* makes clear, any area where a merger has such an impact is an appropriate section of the country. "Proof of the section of the country where the anticompetitive effect exists is entirely subsidiary to the crucial question in * * * every § 7 case which is whether a merger may substantially lessen competition anywhere in the United States" (*Pabst*, *supra*, 384 U.S. at 549-550)

If the banking interests of residents and businesses in small communities are to be protected, the localized

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[31] Moreover, the district court's stated reason for not according significance to the government's proof that most of the merging banks' business is local—that "These percentages have significance only to the extent that they are considered in conjunction with concentration of population" (App. 681)—hardly justified the court's extension of the market to include Bethlehem, a city with a larger population than that of either Phillipsburg or Easton.

nature of banking must be given primary weight in defining banking markets, for it defines the principal area of impact. Otherwise, an effective exemption from the statute will have been created for horizontal mergers of small banks in small communities, thereby reducing for the people of those areas the choice among banking alternatives that Section 7 preserves in the more densely populated areas. This was not the intention of Congress when it adopted the original Section 7, extended it in the Celler-Kefauver Antimerger Act, and reaffirmed this Court's application of it to commercial banking in the Bank Merger Act of 1966.

III

The District Court's Evaluation of the Merger's Effects on Competition and on Community Convenience and Needs Was Defective Because It Applied Erroneous Standards

Under the Bank Merger Act of 1966, the determination of the legality of a bank merger involves a two-step process. *First*, the effect of the merger upon competition must be evaluated, *i.e.*, whether, in the relevant product and geographic markets, it may substantially lessen competition. That determination is made by applying the usual standards under Section 7 of the Clayton Act. *United States* v. *Third National Bank in Nashville*, 390 U.S. 171, 181-183. *Second*, if the merger violates those standards, then the district court may approve it only if it finds that "the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in

meeting the convenience and needs of the community to be served." See *Nashville Bank*, *supra*, at 183-184; *United States* v. *First City National Bank of Houston*, 386 U.S. 361, 369-370.

If the district court erroneously evaluates the effect of the merger on competition—whether by using the wrong markets or by applying improper criteria for determining such effect—that error also invalidates its conclusion that such effect is clearly outweighed by the community convenience and needs. *Nashville Bank*, *supra*, at 183. Similarly, any error in applying the convenience-and-needs standard necessarily also undermines the balancing of the two factors involved. "To weigh adequately one of these factors against the other requires a proper conclusion as to each" (*ibid.*).

In the present case, the district court erred both in evaluating the effect of the merger on competition and in balancing that effect against the meeting of community convenience and needs. The court's threshold error, as we have just shown, was using the wrong geographic market for testing competitive impact. As we shall show, under this Court's Section 7 decisions, the effect of the merger in Phillipsburg-Easton may be substantially to lessen competition.

The district court's evaluation of whether the offsetting convenience-and-needs factor clearly outweighs the merger's anticompetitive effects was defective for a number of reasons: (1) the court weighed this factor against an erroneous assessment of competitive impact; (2) it failed to balance the factors with the kind of detailed consideration that this Court's

Nashville Bank decision requires; (3) it determined competitive effect and community convenience and needs in different geographic markets rather than, as the Act requires, in the same market; and (4) it failed adequately to consider whether the community benefits could have been achieved by a less anti-competitive method than this merger.

A. *The Effect of the Merger in Phillipsburg-Easton May Be Substantially to Lessen Competition.*

Under the criteria developed by this Court, particularly in *Philadelphia Bank*, 374 U.S. at 364-366, for determining the effect upon competition in concentrated markets of so-called horizontal mergers (those between competitors), the effect of this merger may be substantially to lessen competition. The determinative inquiry is the effect of the merger on concentration as reflected in the market shares of the merging banks and of the remaining banks serving the community.

In Phillipsburg-Easton, the commercial banking market is highly concentrated (see Statement, *supra*, pp. 13-15). The merger would significantly increase this concentration. The total deposit shares of the two largest banks would increase from 56 to 65 percent and the merged bank would control 20.2 percent of total deposits and 27.3 percent of total loans and discounts. Its share of overall business would be at least 24 percent (see Statement, *supra*, pp. 13-15). In such a concentrated market, these market shares show that the effect of the merger may be substantially to lessen competition. *Philadelphia Bank* (30

percent combined); *Nashville Bank* (33.6 percent and 4.8 percent); *United States* v. *Von's Grocery Co.*, 384 U.S. 270 (7.5 percent combined); *United States* v. *Pabst Brewing Co.*, 384 U.S. 546 (4.9 percent combined); *United States* v. *Provident National Bank*, 280 F. Supp. 1 (E.D. Pa.) (10 percent combined).

This Court has noted the particular importance of preserving competitive alternatives in banking markets which are already concentrated, since they provide the opportunity for competitive deviations from the oligopolistic pattern. *Philadelphia Bank*, 374 U.S. at 365 n. 42. "[E]ven the mere addition of one seller to an oligopoly market makes the market more complex and less predictable. Therefore there may be competitive actions and reactions in an oligopoly market." *Northern Natural Gas Co.* v. *Federal Power Commission*, 399 F.2d 953, 965-966 (C.A.D.C.). In banking these competitive reactions may manifest themselves in deviations from generally prevailing loan and deposit interest rates (*e.g.*, App. 188, 457-458, 463) and in improved services such as more convenient banking hours (*e.g.*, App. 34) or more conveniently located branches (*e.g.*, App. 273, 398-399).[32]

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[32] For these reasons the district court's view that the government failed to prove its case because it did not show that the merger would result in immediate adverse consequences in daily transactions (App. 688) misconceived the significance of the structural approach to horizontal mergers set forth in *Philadelphia Bank*, 374 U.S. at 366. The extensive evidence offered by the defendants to the effect that bank mergers have no immediate adverse competitive effects is similarly irrelevant. *Id.* at 367, n. 43. See n. 25, p. 32.

B. *The District Court Misconceived and Misapplied the Community Convenience-and-Needs Standards*

As noted, the district court's improper assessment of the competitive impact of the merger vitiated its weighing of that impact against the benefits to the community. *Nashville Bank, supra,* 390 U.S. at 183-184. Moreover, it conclusory statement (App. 699) that "any conceivable anticompetitive effect of the merger is clearly outweighted by * * * the needs and convenience of the community to be served" does not reflect the kind of carefully articulated and reasoned analysis that the Act requires before the court may find that the anticompetitive consequences are "clearly outweighed" by the community benefits. *Nashville Bank* at 187-192.

There were also several serious fundamental defects in the district court's understanding and application of the community convenience-and-needs standards.

1. *Community Convenience and Need Should be Evaluated in the Same Geographical Area as Competitive Effect.* By assessing competitive impact in a broad multi-community market, the court was able to conclude that the anticompetitive effect would be insubstantial; turning to the needs of the community, however, it assessed the present availability of the two needs it focused on—large loans and trust services—only in the Phillipsburg sector of the community.

This approach seriously misapprehends the relation between Section 7 and the Bank Merger Act. The latter statute, whose history has twice been re-

viewed by this Court (in the *Houston Bank* and *Nashville Bank* cases), was a compromise produced in an intense legislative struggle. It had three principal substantive effects: (1) establishment of a uniform standard for the assessment of commercial bank mergers by courts and banking agencies; (2) continuation of traditional antitrust standards for testing the anticompetitive effects of such mergers; and (3) creation of a new affirmative defense to proved violations of the antitrust standards—convenience and needs of the community to be served.[33]

Since the defense depends upon a balancing of anticompetitive effects against the community's needs, both factors must be assessed with reference to the same geographic area if the comparison is to be meaningful. The reason that a particular area is an appropriate geographic market is because it is an area where the merger will have a direct and serious impact upon competition, *i.e.*, it will eliminate one of the reasonably available choices for customers in the area. Any offsetting benefits that may justify the merger must be evaluated on the basis of their effect in the same area. For such benefits relate to the serving of the same banking needs which underlie the selection of the geographic market for determining competitive impact. Congress manifestly intended the convenience-and-needs defense to legalize only those anticompetitive bank mergers whose direct benefits to the people to be served clearly out-

[33] Under the law as it stood prior to the 1966 Act, such a defense was not available. *Philadelphia Bank*, 374 U.S. at 371.

weigh the injury those same people would suffer through the elimination of a significant entity that regularly had been serving them. In terms of the statutory language, the "community to be served," whose convenience and needs are to be evaluated, is the same as the "section of the country" in which the competitive impact of the merger is to be tested. See 112 Cong. Rec. 2445, 2457 (remarks of Rep. Reuss).

In determining the needs of the community when thus properly defined, it is, of course, appropriate to focus on a particular sector if the benefit to that sector will accrue to the entire community. An example might be a merger which would confer otherwise unachievable benefits upon a blighted area of a city. Although the larger urban area would constitute the relevant market, benefit to the smaller area within it might be found, in such a case, to serve the convenience and needs of the city at large.

The district court made no such findings here, however. It never viewed Phillipsburg-Easton as a community in which to measure competition or needs. Although it measured competition in a large multi-community area, it treated Phillipsburg alone (where the anticompetitive effect of the merger would be the most drastic) as the "community" whose banking needs were to be considered—and it assessed those needs with reference only to banking services located in Phillipsburg, while ignoring those available in its twin city across the river.

2. *The district court misapplied the convenience-and-need standard.* In assessing the needs of the Phillipsburg community, the district court considered too narrow a segment of that community. It looked

to the needs of only two groups there—customers for large business loans or for trust services. The needs of the smaller depositors and the smaller borrowers, whose number is far greater, whose banking range is far narrower, and whose local banking alternatives the merger would reduce, were ignored.

The primary need emphasized by the court, as reflected in extensive quotations from testimony (App. 691-698), was the desire of some Phillipsburg businessmen for an opportunity to borrow larger sums from a bank located in Phillipsburg than any of the three banks presently located there can directly supply. But the record shows that in Easton four banks have lending limits equal to or substantially in excess of that of the proposed resulting bank (see n. 14, *supra*, p. 17). Moreover, the larger borrowers, who tend to be established businessmen, have greater access than smaller borrowers to banks elsewhere in the region (see Statement, *supra*, pp. 7, 17-18). In other words, the broad multi-community area used by the court to measure the merger's competitive effect would seem more relevant to assessing this asserted need of the Phillipsburg community than to the purpose for which it was used.

The other need emphasized by the court related to improved trust services. Demand for this service, however, is relatively slight compared with demand for other banking services, and much of the area's need for personal and corporate trust services is satisfied by large banks in cities as distant as Philadelphia and New York, because users of such services are willing to shop further afield (App. 75, 90, 95,

165, 358, 439, 462, 491). Moreover, trust services are available from most of the local banks (App. 838). Both of the merging banks have small trust departments (App. 165, 245, 631-633, 710), and ample trust services are available in Easton from the Easton National Bank, which handles more than $45 million in both personal and corporate trusts (App. 119), and from the Lafayette Trust Bank (App. 388). In addition, Nazareth National Bank, which has a branch in Easton's suburb of Forks, handles some $20 million in trust assets (App. 77). There appears to be no serious demand for trust services in Phillipsburg which cannot be met without difficulty (App. 50, 627).

The district court also found that the larger bank resulting from the merger would benefit the community because it could afford the salaries of a full time specialist in commercial loans and a trust officer (App. 689-690). But it is doubtful that the combined institution would have sufficient business to warrant this step in the near future. An officer from a large Bethlehem bank testified that a full time trust officer becomes justifiable only after trust business approaches $30 million, which may take nearly a decade (App. 111-113). Similarly, a substantially greater volume of commercial loans than either bank presently has would be necessary to support a full time specialist in this field (App. 279).

Small banks typically do not have personnel devoting full time to any one phase of their varied operations (App. 92, 281-282, 384, 396-397, 478-479, 540). Their officials become experienced in several fields, and are usually able to specialize in any one of

them if the need arises. PNB's vice-president conceded that he could handle all commercial lending if he devoted full time to it (App. 268-269; Tr. 869-870), and its consumer loan specialist greatly expanded that department until he was told to concentrate on mortgage loans (App. 267-268, 413-414). Thus the bank's present officials have the potential for necessary specialization, if their business warrants it (see App. 638-639). As a PNB officer recognized (App. 266-267), however, the merger was not expected to produce a significant change in the character of the resulting bank's business (App. 281-282). While the merger might increase its ability to handle business from outside the community, this is an extremely attenuated benefit to the convenience and needs of the people in Phillipsburg-Easton (cf. App. 143-144, 528-529).

We submit that a far more compelling showing of need would be necessary to outweigh clearly the merger's anticompetitive effect in increasing banking concentration in Phillipsburg-Easton—and this showing would have to be all the greater if the Phillipsburg sector alone were to be considered the relevant area. An increase in lending limits when there are other available local sources for larger loans, or the provision of better trust services in a small community where there are several banks with established trust departments, is not enough "clearly" to outweigh the anticompetitive impact of this merger. Undoubtedly the merger would serve the convenience of larger business borrowers, and those who wish to establish trusts. But the fact that the merged bank might be a larger institution which would render

better banking services is not in itself sufficient to establish a defense under the Bank Merger Act. Under that statute a merger cannot be approved unless the gains in better service to the entire community clearly outweigh the anticompetitive detriment to it and the merger is "essential to secure this net gain * * *". *Nashville Bank*, 390 U.S. at 188-189.

3. *The Merging Banks—and the District Court—Failed Adequately to Consider Less Anticompetitive Alternatives to This Merger.* In determining whether benefits to the community outweigh the anticompetitive effects of a merger, the merging banks must demonstrate that any overall gain to the public interest cannot be achieved except by merger. For "[i]f the injury to the public interest flowing from the loss of competition could be avoided and the convenience and needs of the community benefited in ways short of merger but within the competence of reasonably able businessmen, * * * we seriously doubt that Congress intended a merger to be authorized by either the banking agencies or the courts. * * * Otherwise, the benefits of competition, acknowledged by Congress, would be sacrificed needlessly." *Nashville Bank*, 390 U.S. at 189. In the present case, even assuming *arguendo* that the district court properly determined convenience and needs by reference only to Phillipsburg, its ultimate holding on this issue is invalid under the foregoing principle because of its failure adequately to consider less anticompetitive methods of achieving the same benefits.

(a) *Alternatives to Merger Were Not Seriously Pursued.*

Both of the merging banks were growing and profitable. They had increased their assets, deposits and loans dramatically in the preceding decade, had financed substantial improvements and new banking offices internally, and had continued to pay substantial cash dividends (App. 282, 285, 644; Tr. 996; GX-14). Any problems they had resulted largely from their own commercial success within their community.

The district court stressed the lack of full time specialists in their trust and commercial loan departments. It found that there was only "tentative exploration of the possibility of obtaining qualified bank officers," and that this tentative effort "ceased when it became clear that the expense was out of reach" (App. 690). The only evidence of such tentative exploration, however, was a discussion by SNB with an officer of one of the nation's largest banks, Chemical Bank of New York, after the merger had been announced. He indicated that SNB could not meet his terms (App. 406-408). The banks apparently did not investigate whether there were available qualified bank officers from other parts of the country whose compensation requirements might be lower. Except for an occasional casual review of unsolicited placement listings, no effort was made, so far as the record shows, to use the various services specializing in the recruitment of bank specialists and executives. Yet a PNB officer stated that, because of increased business, even if the merger were disapproved the bank would "have to hire somebody * * * [w]hether he was a specialist or not" (App. 284; *compare* App. 285 *with* App. 540-541).

Officers of both banks admitted that one reason for the lack of serious effort to hire new management personnel, during at least the 18 months prior to the merger, was that the merger discussions were under way (App. 644-645, 649, 654, 657-658). These discussions had begun several years before the merger plan was consummated (*e.g.*, App. 630, 644-645), and they directly affected the way the banks were operated. For example, they did not retain cash to pay salaries which might attract full time specialists, although the cash dividends alone were substantial during this period.[34]

Nor did the banks explore methods of increasing their lending limits. They did not seek to enlarge their capital structure by offering new capital stock because, as a spokesman for the banks testified, "if both banks should attempt to sell [new stock] they would only be fighting for the dollar themselves, one against the other which would not do anybody any good" (App. 156). No effort was made to retain cash dividends to enlarge surplus accounts for the purpose of increasing lending limits (App. 714-715; Tr. 996).[35]

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[34] PNB paid cash dividends of $33,000 in 1967 and total dividends from 1962 to 1967 of $192,000; SNB paid cash dividends of $36,250 in 1967 and total dividends between 1962 and 1967 of $198,750 (GX-14; App. 285).

[35] Moreover, lending limits are not an absolute barrier. Where credit risks are sound, requests for loans exceeding the limits may be accommodated through participation with other commercial banks in or outside the area. For example, PNB financed the construction of the local parochial high school by participating in loans in excess of its limit (App. 271-272. See App. 319, 324). It has also accommodated large borrowers by making multiple loans; in 1967 it extended a total credit of $1.6 million to a single businessman (App. 621).

The record further indicates that practical alternatives to merger were available for achieving the benefits the banks contended the merger would produce. A small bank in Easton, Lafayette Trust Company, demonstrated this by hiring new management, issuing stock and taking other steps to enlarge its loan limits and modernize its operations.[36] Internal development by the defendant banks of the allegedly needed services, therefore, was reasonably feasible (cf. *Nashville Bank*, 390 U.S. at 190-192),[37] though perhaps less attractive to the defendants than merger.

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[36] In May 1965—shortly before the defendant banks became involved in their merger plans—Lafayette Trust, then with "approximately 18 million" dollars in deposits (App. 396), hired a new vice president for $11,000 salary with "nothing" in fringe benefits (App. 395). Then, using the methods outlined in the text, Lafayette Trust was able to add two additional branches and a full time mortgage specialist, to build deposits to 24.3 million dollars in December 1966 and to nearly 30 million dollars by September 1968, and to increase its lending limit. Although Lafayette Trust had no full time commercial lending officer, it moved aggressively into that field; it solicited new deposits by boosting passbook interest rates—forcing other Phillipsburg-Easton banks, after some delay, to do the same (App. 118)—and in February 1968 it began computerizing (App. 398). As a result Lafayette Trust, which has only $4 million more in assets than PNB, has a loan limit ($224,365) (see *supra*, n. 14, p. 17) which is more than twice as great (App. 401), because it took steps to increase its capital accounts (App. 403-404).

[37] The merging banks have the financial strength for efforts similar to those of Lafayette Trust (see *supra*, n. 36). Both banks showed substantial growth and considerable profits during the decade preceding the merger (see *supra*, pp. 11, 53, n. 34) and they were able to finance internally the modernization of the offices, the opening of branches and the purchase of au-

(b) *The Possibility of Less Anticompetitive Mergers Was Ignored.*

The trial court failed to weigh, as the government urged (App. 588-589, 593), the possibility of achieving the same community benefits through a less anticompetitive merger. In *Nashville* this Court ruled "that before a merger injurious to the public interest is approved, a showing [must] be made that the gain expected from the merger cannot reasonably be expected through other means" (390 U.S. at 190). The Court held, accordingly, that the owners of the Nashville bank should have made a serious effort to sell to someone, other than their leading competitor, who might have been willing to remedy the bank's difficulties (390 U.S. at 191-192). By the same reasoning, the possibility of a less anticompetitive merger is an alternative which must be explored to satisfy the convenience and needs test. Yet the district court's opinion reveals no consideration of this alternative.

At the time of the merger, PNB and SNB were two of nine banks in Warren County. Under the existing State law, either could have merged with any of the six Warren County banks outside of Phillipsburg, without the severe loss of direct competition

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tomated equipment at substantial costs without reducing their cash dividend. For example, in 1957 PNB modernized its main office and added a parking lot at a cost of $120,000. In 1964 it opened its Hillcrest Branch at a cost of $116,500 and its Alpha Branch at a cost of $130,000. Since 1958 it has purchased $48,000 worth of semi-automated bookkeeping equipment. (GX-14, App. 627, 641-643.)

that is involved here.[38] But neither PNB nor SNB gave "any consideration to contacting any other banks in Warren County with respect to the prospects of merging with one of those banks * * *" (App. 327, 662-663). Two of these Warren County banks, located in the town of Washington, some 12 miles from Phillipsburg, were approximately the same size as the two Phillipsburg banks.[39] Thus, the asserted "con-

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[38] The available number of less anticompetitive alternatives has been greatly increased by the amendments to the New Jersey Branch Banking Law (see, *supra*, p. 16, n. 13). Now either defendant could merge with any of the 86 other banks located throughout the newly created First Banking District, covering all of northern New Jersey (App. 868-870). A merger with such a bank located in some other northern New Jersey community would not involve a loss of existing competition in Phillipsburg-Easton. We believe that it would be appropriate for the district court to consider, on remand, the wider range of alternatives now available.

[39] The First National Bank of Washington had deposits of $18.2 million and the Washington Trust Co. had deposits of $14.5 million, as compared with $22.3 million and $16.0 million for PNB and SNB (App. 684).

Subsequently, the First National Bank of Washington merged with Hackettstown National Bank (deposits of $10 million), to form Warren County National Bank. This merger of two small banks thirteen miles apart was approved by the appropriate federal banking agencies. As pointed out by defendants (Joint Motion to Strike, Affirm and Advance at 17), Warren County National thereafter became an affiliate of First National State Bancorp, a Newark-based holding company.

The possibility that larger Newark-based banks may now enter Warren County by means of such "foothold" acquisitions does not, as appellees suggested in their motion to affirm, justify the merger of PNB and SNB to foreclose this threat of additional local competition. Such a merger might be justified only where small competitors had to combine to save themselves from destruction by large firms. *United States* v. *Von's Grocery Co.*, 384 U. S. 270, 277.

venience-and-needs" benefits based on increased size and lending limit might well have been available through merger with either of these banks.

Small banks can compete successfully in small markets and indeed can compete successfully with large banks if they have the will to do so. *Nashville Bank*, 390 U.S. at 191, n. 24.[40] As a class they face similar problems—difficulty in hiring full time specialists, lending limitations, and restriction of business opportunities because of the small size of the community they serve. If the common problems of small banks in small communities were to be a justification for merger in the absence of significant efforts to alleviate them by other means, multiple banking alternatives would be likely to disappear in many of the small towns of America. But Section 7 of the Clayton Act and the Bank Merger Act were intended to preserve a diversity of banking opportunity for all Americans—in small communities as well as large.

[40] See Kohn, *The Future of Small Banks: An Analysis of Their Ability to Compete with Large Banks* (N.Y. State Banking Dept. 1966), p. 18.

CONCLUSION

The judgment of the district court should be reversed and the case remanded for further consideration under correct criteria.

Repectfully submitted.

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APPENDIX

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Section 18(c) of the Bank Merger Act of 1966, 80 Stat. 7, 12 U.S.C. (Supp. II) 1828(c), provides:

> "(c)(1) Except with the prior written approval of the responsible agency, which shall in every case referred to in this paragraph be the Corporation, no insured bank shall—
>
> "(A) merge or consolidate with any noninsured bank or institution;
>
> "(B) assume liability to pay any deposits made in, or similar liabilities of, any noninsured bank or institution;
>
> "(C) transfer assets to any noninsured bank or institution in consideration of the assumption of liabilities for any portion of the deposits made in such insured bank.
>
> "(2) No insured bank shall merge or consolidate with any other insured bank or, either di-

rectly or indirectly, acquire the assets of, or assume liability to pay any deposits made in, any other insured bank except with the prior written approval of the responsible agency, which shall be—

"(A) the Comptroller of the Currency if the acquiring, assuming, or resulting bank is to be a national bank or a District bank;

"(B) the Board of Governors of the Federal Reserve System if the acquiring, assuming, or resulting bank is to be a State member bank (except a District bank);

"(C) the Corporation if the acquiring, assuming, or resulting bank is to be a nonmember insured bank (except a District bank).

"(3) Notice of any proposed transaction for which approval is required under paragraph (1) or (2) (referred to hereafter in this subsection as a 'merger transaction') shall, unless the responsible agency finds that it must act immediately in order to prevent the probable failure of one of the banks involved, be published—

"(A) prior to the granting of approval of such transaction,

"(B) in a form approved by the responsible agency.

"(C) at appropriate intervals during a period at least as long as the period allowed for furnishing reports under paragraph (4) of this subsection, and

"(D) in a newspaper of general circulation in the community or communities where the main offices of the banks involved are located, or, if there is no such news-

paper in any such community, then in the newspaper of general circulation published nearest thereto.

(4) In the interests of uniform standards, before acting on any application for approval of a merger transaction, the responsible agency, unless it finds that it must act immediately in order to prevent the probable failure of one of the banks involved, shall request reports on the competitive factors involved from the Attorney General and the other two banking agencies referred to in this subsection. The reports shall be furnished within thirty calendar days of the date on which they are requested, or within ten calendar days of such date if the requesting agency advises the Attorney General and the other two banking agencies that an emergency exists requiring expeditious action.

"(5) The responsible agency shall not approve—

"(A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or

"(B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the trans-

action in meeting the convenience and needs of the community to be served.

In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.

"(6) The responsible agency shall immediately notify the Attorney General of any approval by it pursuant to this subsection of a proposed merger transaction. If the agency has found that it must act immediately to prevent the probable failure of one of the banks involved and reports on the competitive factors have been dispensed with, the transaction may be consummated immediately upon approval by the agency. If the agency has advised the Attorney General and the other two banking agencies of the existence of an emergency requiring expeditious action and has requested reports on the competitive factors within ten days, the transaction may not be consummated before the fifth calendar day after the date of approval by the agency. In all other cases, the transaction may not be consummated before the thirtieth calendar day after the date of approval by the agency.

"(7)(A) Any action brought under the antitrust laws arising out of a merger transaction shall be commenced prior to the earliest time under paragraph (6) at which a merger transaction approved under paragraph (5) might be consummated. The commencement of such an action shall stay the effectiveness of the agency's approval unless the court shall otherwise specifically order. In any such action, the court shall review de novo the issues presented.

"(B) In any judicial proceeding attacking a merger transaction approved under paragraph (5) on the ground that the merger transaction alone and of itself constituted a violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2), the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph (5).

"(C) Upon the consummation of a merger transaction in compliance with this subsection and after the termination of any antitrust litigation commenced within the period prescribed in this paragraph, or upon the termination of such period if no such litigation is commenced therein, the transaction may not thereafter be attacked in any judicial proceeding on the ground that it alone and of itself constituted a violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2), but nothing in this subsection shall exempt any bank resulting from a merger transaction from complying with the antitrust laws after the consummation of such transaction.

"(D) In any action brought under the antitrust laws arising out of a merger transaction approved by a Federal supervisory agency pursuant to this subsection, such agency, and any State banking supervisory agency having jurisdiction within the State involved, may appear as a party of its own motion and as of right, and be represented by its counsel.

"(8) For the purposes of this subsection, the term 'antitrust laws' means the Act of July 2,

1890 (the Sherman Antitrust Act, 15 U.S.C. 1-7), the Act of October 15, 1914 (the Clayton Act, 15 U.S.C. 12-27), and any other Acts in pari materia."

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